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BEFORE THE FOREST PRACTICES APPEALS BOARD

STATE OF WASHINGTON

WASHINGTON TOXICS COALITION,
et al,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT
OF NATURAL RESOURCES and BOISE
CASCADE CORPORATION,

Respondents.

NO. 91-7

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER SUSPENDING
FOREST PRACTICE APPROVAL

This matter came on for hearing in Lacey, Washington, on June 14, 1991, before William A. Harrison, Administrative Appeals Judge, on the Motion of appellants for a suspension of the Department of Natural Resources' (DNR) approval of the forest practice applications pending the decision of the Forest Practices Appeals Board on the merits. Appellants were represented by Jay F. Sherrerd, Attorney at Law, respondent DNR was represented by Kathryn L. Gerla, Assistant Attorney General, and respondent Boise Cascade Corporation was represented by Tony J. Steenkolk, Attorney at Law. Having heard arguments of counsel and reviewed the file and the affidavits and exhibits submitted into evidence, Judge Harrison hereby makes these:

FINDINGS OF FACT:

1.

The forest practice applications at issue propose to apply some 5,000 gallons of carbaryl and diesel oil to 11,503 acres of forest land over a five-day period, in order to control the

1 Western Spruce Budworm.

2 2.

3 The affidavit of David H. Monroe, a Doctor of Environmental
4 Toxicology, relates a significant long-term decline in bird
5 populations, remaining depressed through the following year,
6 following the use of Carbaryl in New Jersey.

7 3.

8 The affidavit of Professor Christian E. Grue, a Doctor of
9 Wildlife Fisheries, states that the use of carbaryl reduces the
10 amount of invertebrate prey available to birds, and that the
11 presence of young birds in nests may reduce the ability of mature
12 birds to leave the area in search of food without imperiling the
13 young. Carbaryl further effects young birds by decreasing growth
14 rates, as well as nestling survival, fledging rates and post-
15 fledging survivals.

16 4.

17 The affidavit of David A. Manuwal, an ornithologist and
18 Doctor of Zoology, indicates that many birds within the project
19 area will be incubating their eggs or feeding their young during
20 the proposed time for spraying, and therefore will be in a
21 sensitive state.

22 5.

23 The forest practice applications as approved by DNR require
24 100-foot buffers around all flowing waters and open standing
25 waters. The affidavit of Richard Lawson of Boise Cascade
26 indicates the applicant intends to leave 300-foot buffers.

1 However, the Final Environmental Impact Statement of the U. S.
2 Forest Service, at page 14 of the Summary, notes that in most
3 cases carbaryl poses low risk to streams and fish when a 500-foot
4 buffer is maintained.

5 6.

6 There is a confirmed nest of the Spotted Owl, which is a
7 threatened species under the laws of the United States, within the
8 proposed spray area.

9 7.

10 Since the U. S. Forest Service prepared an Environmental
11 Impact Statement and determined that the more environmentally
12 doubtful treatment method is carbaryl, it appears that carbaryl
13 itself was a key factor in the decision to prepare an E.I.S.

14 8.

15 The affidavit of Ms. Iral Rajenovich, Entomology Group
16 Leader, Forest Pest Management, U.S. Forest Service, Pacific
17 Northwest Region, indicates that the Forest Service uses the
18 biological insecticide B.t. because it is environmentally
19 preferable. Furthermore, the affidavit of Mr. Eric LaGasa, Chief
20 Entomologist for the State of Washington Department of Agriculture
21 (WSDA), states that B.t. is the control method of choice.

22 9.

23 The State of Washington, through the Department of Natural
24 Resources, has not adopted the Final Environmental Impact
25 Statement of the U. S. Forest Service through the public hearing
26 and public comment processes required by the State Environmental

1 Policy Act.

2 10.

3 The 1991 spruce budworm infestation in the proposed treatment
4 area has not been shown to be particularly extreme nor expanding
5 more rapidly than expected. The infestation is not substantially
6 different than that of 1988, 1989, 1990, or that which may be
7 expected in the future.

8 11.

9 From the affidavit of Mr. Armando Flores, Western Regional
10 Manager for the Chemical and Agricultural Products Division of
11 Abbott Laboratories, there appears to be a plentiful supply of
12 insecticide in the form of Bt for immediately combatting the
13 infestation.

14 12.

15 Any Conclusion of Law which is deemed a Finding of Fact is
16 hereby adopted as such. From these Findings of Fact, Judge
17 Harrison hereby makes these

18 CONCLUSIONS OF LAW

19 13.

20 In ruling on this Motion for Suspension of the forest
21 practice approval, the Judge has to estimate the appellants'
22 likelihood of success on the merits. In reviewing the record,
23 which is fairly extensive, I find that the magnitude of the
24 proposal and its potential for significant adverse environmental
25 impacts leads me to conclude that appellants are likely to succeed
26 on the merits.

14.

The fact that the U. S. Forest Service prepared an Environmental Impact Statement for Management of the Western Spruce Budworm in Oregon and Washington indicates that the proposal to spray carbaryl will have a more than moderate effect on the quality of the environment.

15.

The case of Tyler Pipe Industries, Inc. v. The Department of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982), sets forth the standard for granting appellants' motion for a suspension of the forest practice approval:

Appellants' "must show (1) that [they] have a clear legal or equitable right, (2) that [they] have a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to [them]." 96 Wn.2d at 792.

16.

Appellants' legal and equitable right is provided by the State Environmental Policy Act, which recognizes each person's "fundamental and inalienable right to a healthful environment." RCW 43.21C.020.

17.

Appellants have shown a well-grounded fear of invasion of that right.

18.

Finally, there must be a showing that the acts complained of do substantial injury to the party moving for a stay, in

1 proportion to the injury or harm to the other party. In deciding
2 that final criteria, I balance the irreparable harm to the
3 terrestrial and aquatic organisms in the forest from the
4 application of carbaryl, with the environmental harm that is
5 occurring as a result of the spruce budworm infestation. However,
6 there is nothing unusual in this year's infestation. Moreover,
7 the affidavit of Mr. Armando Flores indicates that there is a
8 plentiful supply of B.t. available for immediately combatting the
9 infestation. This final consideration tips the balance.

10 19.

11 Therefore, I find that the requirements of Tyler Pipe
12 Industries, supra, have been met.

13 20.

14 Any Finding of Fact which is deemed a Conclusion of Law is
15 hereby adopted as such. From these Conclusions of Law, Judge
16 Harrison enters this

17 ORDER

18 The approval by the Department of Natural Resources of the
19 forest practices applications of Boise Cascade Corporation is
20 hereby suspended pending the decision of the Forest Practices
21 Appeals Board on the trial on the merits.

22 The Motion of Boise Cascade for an Order requiring Appellants
23 to post a bond in the amount of \$1,000,000, is hereby denied as to
24 that amount but will be granted as to a nominal amount. As Boise-
25 Cascade declines to Move for a bond in a nominal amount, the
26 Motion is hereby DENIED.

DONE at Lacey, Washington, this 29th day of October,
1991, nunc pro tunc for June 14, 1991.

William A. Harrison

WILLIAM A. HARRISON
Administrative Appeals Judge

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